No. 92-2038

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ASGROW SEED COMPANY,

Petitioner,

v.

DENNY WINTERBOER and BECKY WINTERBOER, d/b/a DEEBEES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

MOTION AND BRIEF OF AMICUS CURIAE AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION IN SUPPORT OF PETITIONER

Pursuant to Rule 37 of this Court, the American Intellectual Property Law Association (AIPLA) respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the petition for certiorari. Respondents have refused consent for AIPLA to file the brief.

AIPLA is a national association whose members are primarily intellectual property attorneys. As such, AIPLA is concerned with the proper interpretation

of important Federal statutes, such as the Plant Variety Protection Act (PVPA), which protect various forms of intellectual property.

AIPLA believes that its views will be helpful to the Court in understanding the impact of the decision below on the PVPA, and in particular, how that decision has totally upset the balance created by Congress between encouraging innovation in the seed industry and addressing the needs of farmers who use protected seed varieties.

Respectfully submitted,

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QUESTION PRESENTED

Amicus curiae, American Intellectual Property Law Association, adopts the following question presented by petitioner Asgrow Seed Company:

Whether the Federal Circuit erred as a matter of law in holding that 7 U.S.C. § 2543 [of the Plant Variety Protection Act] permits up to half of a farmer's crop produced from a novel plant variety to be sold as seed in competition with the owner of the novel variety?

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BRIEF OF AMICUS CURIAE AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The American Intellectual Property Law Association (AIPLA) is a national association of more than 8,000 members, primarily attorneys, whose interest and practice lie in the areas of patent, copyright, trademark, trade secret, and other intellectual property law. AIPLA's members are employed by private law firms, corporations, universities, and government. AIPLA has no interest in either of the parties.

AIPLA is concerned with the balance between the encouragement of innovation and the freedom of the public to reap the benefits of such innovations. The Federal Circuit's decision in this case is troubling because it serves to *discourage* innovation in the seed industry, thus upsetting this balance. Indeed, as recognized by Circuit Judge Newman, "it is not too dramatic to observe that this ruling nullifies the Plant Variety Protection Act as an incentive for innovation in agriculture." Pet. App. C, p. 30a.

AIPLA believes that this case is of national importance because of its potentially devastating effect on innovation in the United States seed industry, and consequently the continued development and global competitiveness of American agriculture, directly contrary to Congress' clearly stated intent. Therefore, AIPLA urges that this Court grant the petition for writ of certiorari.

SUMMARY OF ARGUMENT

This case involves a question of statutory interpretation of the Plant Variety Protection Act (PVPA), which Congress enacted to provide legal protection for the developers of novel seed varieties. The Federal Circuit interpreted 7 U.S.C. § 2543 of the PVPA, which allows a farmer to save seed and, in limited circumstances, to sell "such saved seed," as permitting up to *half* of a farmer's entire crop to be sold as seed. This decision not only is at odds with the legislative history and the statutory language of the PVPA, it frustrates the purpose of the PVPA by allowing farmers to sell novel seed varieties in direct competition with the seed developers. By authorizing this practice, the Federal Circuit's decision substantially erodes the protection for novel seed varieties that Congress intended to provide in enacting the PVPA. As a result, the seed industry's incentive to make significant investments in research and development of new seeds will be severely diminished. Ultimately, it is the national interest that will suffer by not having the greater quality and variety of agricultural products on the market that the PVPA was enacted to ensure. This case is therefore of national importance, and merits a grant of certiorari from this Court.

ARGUMENT

I. THE PURPOSE OF THE PLANT VARIETY PROTECTION ACT IS TO PROMOTE INNOVATION IN AMERICAN AGRICULTURE

The Plant Variety Protection Act (PVPA), 7 U.S.C. §§ 2321-2582, enacted by Congress in 1970, provides patent-like protection for novel varieties of sexually reproduced seed, transplants, and plants. Congress' aim in enacting the PVPA was to increase the competitiveness of American agricultural products in world markets and, ultimately, to result in superior products more resistant to disease and higher in overall yield and quality. This purpose is reflected in the legislative history, *see* H.R. Rep. No. 1605, 91st Cong., 2d Sess. 1-3 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5082, 5082-83, as well as the language of the statute itself. 7 U.S.C. § 2581.

To achieve this purpose, the PVPA provides limited exclusive rights for a term of 18 years to breeders of novel plant varieties who obtain a Certificate of Plant Variety Protection from the Plant Variety Protection Office. 7 U.S.C. §§ 2482-83. This Certificate

grants the breeder the right "to exclude others from selling the variety, or offering it for sale, or reproducing it, or importing it, or exporting it, or using it in producing . . . a hybrid or different variety therefrom." 7 U.S.C. § 2483(a). Through its grant of exclusive rights, the PVPA provides incentives for seed companies to increase their research and development of novel seed varieties, and thus achieve the purposes of the Act.

In enacting the PVPA, Congress expressly balanced the plant breeder's exclusive rights with the practical needs of farmers who would use the protected seed varieties. Under the Act, a farmer could, of course, sell seed produced from a protected seed variety for "other than reproductive purposes," such as food or animal feed. 7 U.S.C. § 2543. In addition, farmers were allowed to continue their usual practice of saving part of their crop as seed for replanting on their farms. To qualify for this exemption, however, the seed must not have been grown "as a step in marketing (for growing purposes)" the seed. *Id.*; 7 U.S.C. § 2541(3). Thus, the first sentence of § 2543 provides:

> Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on his farm or for sale as provided in this section . . . .

Section 2543 also permits a farmer who does not use the saved seed himself to sell it to another farmer, provided that neither farmer is in the seed business:

> [I]t shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable.

Id.

II. THE FEDERAL CIRCUIT'S BROAD INTERPRETATION OF THE "FARMER'S EXEMPTION" NULLIFIES THE ACT AS AN INCENTIVE FOR INNOVATION

The dilemma inherent in this case is how to interpret the scope of the exemption in § 2543 while still retaining Congress' aim in enacting the PVPA of encouraging innovation in the seed industry. In one early PVPA case, brought before the advent of the Federal Circuit, the Fifth Circuit expressly recognized that the "farmer's exemption" in § 2543 is somewhat at odds with the primary purpose of the PVPA:

> While the main body of the Act assures developers of novel varieties of the exclusive right to sell and reproduce that variety, the crop exemption dilutes that exclusivity by allowing individual farmers to sell the protected variety without liability. The broader the construction given the exemption, the smaller the incentive for breeders to invest the substantial time and effort necessary to develop new strains.

Delta & Pine Land Co. v. Peoples Gin Co., 694 F.2d 1012, 1016 (5th Cir. 1983). Thus, the court concluded

that a narrower interpretation of the exemption was "more in keeping with Congress' primary objective." *Id.* The court further elaborated that a more narrow reading of the exemption in § 2543 "creates the greatest amount of internal harmony in the overall statutory scheme." *Id.*

Instead of reading the exemption narrowly in keeping with Congress' objective, the Federal Circuit in *Asgrow Seed* interpreted § 2543 as permitting *up to half of a farmer's entire crop to be sold as seed.* By this interpretation, the Federal Circuit has totally upset the balance created by Congress between encouraging innovation in the seed industry and addressing the needs of farmers. "Although it may appear that the broadest reading of the exemption would benefit farmers today, it could be detrimental to their interests tomorrow." *Delta & Pine Land Co.*, 694 F.2d at 1016.

Specifically, the Federal Circuit in *Asgrow Seed* held that § 2543 does not limit the amount of seed a farmer can save, Pet. App. A, at pp. 6a, 10a-11a, and that the only quantitative limit on sales of protected seed varieties is that the seller and buyer must be persons whose "primary occupation is the growing of crops for sale other than reproductive purposes." Pet. App. A, at pp. 7a-8a. Thus, under the court's reasoning, the only limit on the amount of seed sales permitted under § 2543 is that a farmer must grow more crops from the protected seed variety for sale to consumers than for sale to other farmers for planting. Pet. App. A, at p. 8a. The court further held that this "primary farming" determination must be made on a "crop-by-crop" basis with respect to each novel variety protected under the Act. *Id.*

The Federal Circuit's decision reaches a result that is totally contrary to Congress' intent in enacting the PVPA. It essentially allows farmers to, themselves, sell large quantities of novel seed varieties, thus entering into competition with the seed developers. By allowing up to half of a farmer's crop to be sold as seed, the Federal Circuit authorizes this practice. Surely, allowing farmers to enter into competition with the seed developers is not the result that Congress intended in enacting the PVPA. As the district court's opinion in this case points out, allowing farmers to sell virtually unlimited amounts of seed developers' novel seed strains would frustrate the intent of the PVPA. Pet. App. B, p. 23a. The more that farmers are allowed to compete with the seed developers, the less likely it is that there will be innovation in the field. The national interests in having new and improved plants on the market will inevitably suffer as a result of the Federal Circuit's ruling.

Moreover, the Federal Circuit's interpretation of the statute is neither required nor supported by the statutory language. A more logical reading of the statute, in keeping with the Act's purpose, is that the first sentence of § 2543 limits the amount of saved seed subject to being sold to the amount needed to produce another crop on the farmer's own farm. As Judge Newman explained in her dissent, § 2543 was designed to "permit continuation of the historical practice of farmers to save seed for their own use, *with occasional minor transactions with neighbors on this saved seed.*" Pet. App. C, pp. 37a-38a (emphasis added). Such an interpretation of the statute is consistent with the statutory language, the express intent of Congress, and the stated purpose of the PVPA.

III. THE FEDERAL CIRCUIT'S DECISION INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE REVIEWED BY THIS COURT

The PVPA is critically important to the private seed industry's research activities in developing novel seed varieties and bringing them to the public. Without some form of legal protection against the sale of protected seed, developers of novel seed varieties will not be able to recoup their extensive research and development costs. By allowing up to half of a farmer's entire crop to be sold as seed, however, the Federal Circuit's decision substantially erodes the protection of the PVPA and serves to discourage innovation in the seed industry. The seed industry will, undoubtedly, be devastated by the Federal Circuit's decision in this case. The purpose of Congress in enacting the PVPA was to invigorate the seed industry, not to cripple it.

Moreover, such a disincentive to the seed industry creates a chain effect: the less time the seed companies spend on research and development, the smaller the chance of discovering superior varieties of seed. The smaller the chance of discovering novel seed varieties, the less chance consumers have to reap the benefits of such potentially superior products. *See Delta & Pine Land Co.*, 694 F.2d at 1016 (tracing long-term effects of giving broad construction to PVPA exemption). Therefore, it is clear that the effect of the Federal Circuit's decision in this case spreads well beyond the private seed industry.

This case further underscores the importance of the supervisory role of the Supreme Court over the Federal Circuit. Because the Federal Circuit has exclusive jurisdiction over appeals involving the PVPA, 28

U.S.C. §§ 1295(a)(1), 1338, there will not be a split among the circuits on this issue. Now that the Federal Circuit has fixed the rule on the interpretation of the farmer's exemption in § 2543 of the PVPA, there is no chance for further development in the law on this issue.

Congress intended this Court to review decisions of the Federal Circuit where circumstances warrant. *See Cornelius v. Nutt*, 472 U.S. 648, 657 (1985); H.R. Rep. No. 312, 97th Cong., 1st Sess. 18-19 (1981). This Court has previously granted certiorari in similar circumstances involving interpretation of a Federal statute within the exclusive jurisdiction of the Federal Circuit, where an important public policy involving the balance between encouraging innovations and the right to use those innovations was at issue. *See Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661 (1990) (interpreting statutory exemption from patent infringement in 35 U.S.C. § 271(e)(1)).

AIPLA submits that the circumstances warrant review in this case. The Federal Circuit's decision, if left unchecked, will have a potentially devastating effect on innovation in the seed industry, and consequently, the competitiveness of American agriculture. Ultimately, it is the national interest that will suffer from decreased innovation in the seed industry, which will result from this greatly decreased legal protection for novel seed varieties. This Court should not allow a panel decision of a Court of Appeals, which was denied *in banc* consideration by a single vote, to frustrate the entire purpose of an important federal statute without further review at the highest level.

CONCLUSION

For these reasons, the American Intellectual Property Law Association as *amicus curiae* urges that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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